

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division
BRADLEY R. O'BRIEN
Environmental Enforcement Section
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
Telephone: (415) 744-6484
E-mail: brad.obrien@usdoj.gov

ALICIA A.G. LIMTIACO
United States Attorney
MIKEL SCHWAB
Assistant U.S. Attorney
Suite 500, Sirena Plaza
108 Hernan Cortez
Hagatna, Guam 96910
Tel: (671) 472-7332
E-mail: mikel.schwab@usdoj.gov

UNITED STATES DISTRICT COURT FOR
THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COMMONWEALTH UTILITIES
CORPORATION, and the
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Defendants.

Case No. 08-cv-0051

**UNITED STATES' RESPONSE TO
CUC'S MOTION TO CONSTRUE
AND CLARIFY ORDER**

Judge: Hon. David O. Carter

Hearing Date: TBD

Time:

Location:

TABLE OF CONTENTS

| | | |
|------|-------------------------------|--------|
| I. | INTRODUCTION | - 1 - |
| II. | DISCUSSION | - 4 - |
| A. | The EEMC Order | - 4 - |
| 1. | EEMC Authority | - 4 - |
| 2. | Funding Obligations..... | - 4 - |
| 3. | Potential EEMC Projects | - 5 - |
| 4. | Tank 102 | - 8 - |
| 5. | CUC Contracts | - 9 - |
| III. | CONCLUSION..... | - 11 - |

I. INTRODUCTION

On December 8, 2014, the Commonwealth Utilities Corporation (“CUC”) filed a motion (“CUC Motion”) (Dkt No. 162-1) requesting the Court to determine by videoconference broad and conflicting CUC positions regarding the scope of the potential responsibilities of the Engineering and Environmental Management Company (“EEMC”) established by the Court’s September 26, 2014 Order (“EEMC Order”). Dkt No. 151. As described below, CUC’s filing is a result of CUC’s procedural irregularities and lacks factual and legal support.

During a “meet and confer” telephone call held on December 4, 2014 PST, the United States pointedly objected to CUC using an informal email (“CUC email request”) to the Court raising substantive issues regarding CUC’s and the EEMC’s obligations under Stipulated Order Number Two (“SO2”) and the EEMC Order. Declaration of Bradley O’Brien (“O’Brien Dec.”)¹ ¶¶ 5-6. The United States admonished CUC for violating the Court’s unambiguous direction forbidding CUC from continuing CUC’s past practice of raising substantive issues with the Court through email exchanges. *Id.* ¶ 3. In addition to violating the Court’s direction and standard legal practice, CUC’s email request, since it is not in the form of a motion filed with the Court, shields its actions from public review. During the December 4, 2014 PST telephone call, the United States made abundantly clear to CUC that CUC was fully aware that its informal email request violated the Court’s direction, the Federal Rules of Civil Procedure and the Commonwealth of the Northern Mariana Islands (“CNMI”) Local Rules (*e.g.*, L.R. 1.5).² *Id.* ¶¶ 5-6. Only after the United States strenuously objected to CUC’s email request and rightly insisted that formal documents be filed in the normal manner did CUC file

¹ Mr. O’Brien’s declaration is included as Attachment A.

² The parties properly utilize email with the Court for non-substantive issues such as coordinating scheduling.

1 the instant request – now deemed an emergency³ by CUC.⁴ *Id.*

2 CUC’s Motion is conflicting as it requests the Court to find that the United
3 States Environmental Protection Agency (“EPA”) does not have the authority to
4 direct which SO₂ projects will be implemented by the EEMC. An accompanying
5 declaration signed by CUC legal counsel James Sirok (“Sirok Dec.”) seeks to hold
6 the EEMC responsible for “all aspects of Stipulated Order No. 2,” but also
7 concedes that CUC is required to fund and implement SO₂ projects such as those
8 responsibilities given to the Technical Manager for Oil (“TMO”).⁵ The United
9 States agrees that CUC is required to sustain and staff the TMO position and fund a
10 budget for TMO related work, so that question is not in dispute. Mr. Sirok’s
11 apparently mistaken remark that the EEMC is essentially CUC for “all” SO₂
12 purposes is not supportable as the EEMC is not a party to SO₂, and CUC is bound
13 under SO₂’s terms as re-affirmed by the EEMC Order that states, “This [EEMC]
14 Order does not modify, preclude, or impact any SO₂ requirements.” EEMC Order
15

17 ³ There is no reason that CUC could not have timely raised these issues after entry
18 of the EEMC Order. Curiously, in light of the numerous status conferences and
19 conversations involving the parties that included weekends and late nights, CUC
20 seems to place CUC’s failure to timely notify the Court on the United States not
21 being suitably available for conference calls. Sirok Dec. ¶¶ 3, 5, 8. However, EPA
22 counsel responded in writing to these issues on October 23, 2014 PST, and
23 additional discussions took place promptly thereafter. O’Brien Dec. ¶ 4. Sirok Dec.
24 ¶¶ 3, 5. Further, after returning to the office Mr. O’Brien contacted Mr. Sirok on
25 November 5, 2014 PST, seeking to “set-up a time to discuss your concerns,” but
26 Mr. Sirok did not respond to the email, and ultimately contacted Mr. O’Brien on
27 November 25, 2014, after the completion of Mr. Sirok’s two week work leave.
28 O’Brien Dec. ¶ 4; Sirok Dec. ¶ 8. The parties subsequently spoke after the
Thanksgiving holiday. *Id.* ¶ 9.

⁴ The EEMC Order provides that the United States may seek emergency relief
before the Court, CUC is not afforded the opportunity under the EEMC Order.
EEMC Order ¶ B3.

⁵ Sirok Dec. ¶ 4, Dkt No. 163; CUC Motion ¶ B1.

US’ RESPONSE TO CUC’S MOTION TO CONSTRUE AND CLARIFY ORDER
United States v CUC, et al. 08-CV-0051

¶ B2. Therefore, the United States’ response will focus on CUC’s argument regarding EPA’s authority to direct whether the EEMC, CUC, or EPA can implement the thirteen SO₂ projects described by CUC. *See*, CUC Motion ¶ B1. (Issue raised by this Motion and Question Presented for Clarification).

CUC’s position that EPA does not have the authority to direct whether the EEMC, CUC, or EPA will implement SO₂ projects is incorrect. CUC’s self-described “thirteen SO₂ projects” are not part of the EEMC Order but are among the projects required under SO₂, which the EEMC Order expressly did not modify, preclude, or impact. EEMC Order ¶ B2.

The EEMC Order provides EPA general authority to prioritize projects, select the entity to implement the project, and oversee the work: 1) Subject to EPA prioritizing SO₂ projects, after consultation with CUC, the EEMC shall implement SO₂ as described in Section D of the EEMC Order; 2) depending upon which entity is performing the work, the EEMC and CUC must comply with all SO₂ requirements; 3) EPA retains the authority to perform work that would be otherwise performed by the EEMC; and 4) the EEMC may implement projects only with EPA approval. *Id.* ¶¶ B1, B2, B6, D1.(f).

In light of CUC’s longstanding inability to accomplish SO₂ requirements, EPA anticipates that the EEMC will have a significant role in implementing SO₂ projects. The EEMC’s role will be shaped as the process unfolds; funding is made available by CNMI; better defined cost estimates are generated; financing needs are clarified, and projects are completed by the EEMC, CUC, or EPA as directed by EPA. Declaration of Michelle Rogow (“Rogow Dec.”)⁶ ¶ 10. However, the EEMC does not step into CUC’s shoes, nor does the EEMC Order allow CUC to walk away from its SO₂ and EEMC Order obligations.

⁶ Ms. Rogow’s declaration is included as Attachment B.

II. DISCUSSION

A. The EEMC Order

On September 26, 2014, the Court entered the EEMC Order thereby resolving the United States' motion brought against CUC and CNMI seeking a receiver and other relief. (Dkt Nos. 15, 141, 151). The EEMC Order provides, in part, that an EEMC be retained under the Court's jurisdiction to help achieve expeditious compliance with SO₂ requirements. EEMC Order ¶ A2.

1. EEMC Authority

The EEMC Order resulted from CUC's systemic inability to complete SO₂ requirements and provides the EEMC authority to complete projects selected and approved by EPA. *Id.* ¶¶ B1, B2, B6, D1.(f). The EEMC is not subject to CUC's and CNMI's financial, procedural, and contractual roadblocks that plagued CUC thereby allowing the EEMC to implement projects in a timely and cost efficient manner subject to the Court's and EPA's approvals. *Id. Passim.*

2. Funding Obligations

Beginning no later than December 31, 2014, and ending no later than February 1, 2018, CNMI is required to make scheduled payments or file a Notice with the Court of the Department of the Interior's ("DOI") Authorization to Proceed confirming DOI's authorization to use grant monies for specified SO₂ projects. *Id.* ¶ D1.(a), (b). CNMI's funding obligation totals \$22.8M. *Id.* CNMI is also required by December 26, 2014, to provide a financial guarantee approved by the United States for this funding. *Id.* These payments are limiting factors on the scope of the work that the EEMC can accomplish, and there may be project specific DOI restrictions on the grant monies made available to the EEMC. Rogow Dec. ¶¶ 10, 12-16, 28-29.

In addition to the \$22.8 million being provided by CNMI pursuant to Section D of the EEMC Order, CUC memorialized in Section D1.(d) of the EEMC Order that \$2.271M in grant funding is still available for SO₂ projects. CUC

1 agreed that this funding would be used by CUC to complete SO₂ projects or be
 2 reprogrammed for EEMC use. EEMC Order ¶ D1.(d); Rogow Dec. ¶ 29, Ex. 1, at
 3 4-5. This provision in the EEMC Order is further evidence of CUC's continuing
 4 obligations under SO₂ and to conduct SO₂ related work. Rogow Dec. ¶ 29.

5 3. Potential EEMC Projects

6 As the regulatory environmental agency, the EEMC Order provides EPA a
 7 substantial role in selecting the projects that will be implemented by the EEMC
 8 and overseeing how the work is implemented. *Id.* ¶ 11. Because CUC's Motion
 9 asserts that the EEMC is solely responsible for implementing CUC's "thirteen SO₂
 10 projects," the United States respectfully refers the Court to the following EEMC
 11 provisions that describe that EPA will direct whether SO₂ projects are conducted
 12 by the EEMC, CUC, or EPA:⁷

13 Subject to EPA prioritizing SO₂ projects, after consultation between
 14 EPA and CUC, the EEMC shall implement SO₂ and be funded as
 15 described in Section D ("Remuneration"). EEMC Order ¶ B1.

16 Depending on which entity is performing the work, the EEMC and
 17 CUC must comply with all SO₂ requirements, including but not
 18 limited to all notification and submission requirements and obtaining
 EPA approvals. *Id.* ¶ B2.

19 To the extent EPA determines it is appropriate for EPA to perform
 20 work that would otherwise be performed by the EEMC, EPA will
 21 consult with the EEMC and CUC relating to the extent to which EPA
 will conduct such activities and the funding for such work. *Id.* ¶ B6.

22 EPA and CUC shall consult regarding the EEMC's scope of work and
 23 cost estimate. Upon receipt of EPA approval, the EEMC may
 24 implement the project consistent with SO₂ and this [EEMC] Order.
 25 *Id.* ¶ D1.(f).

26 ⁷ EPA is currently performing cleanup work at Power Plants 1 & 2, and the Rota
 27 Power Plant and may need to remain the lead on that work until EEMC funding is
 28 available. Rogow Dec. ¶¶ 17-18; Rogow Primary Declaration, Dkt No. 144;
 Michelle Rogow Supplemental Declaration, Dkt No. 145.

1
2 The EEMC Order imposes funding requirements upon CNMI; however,
3 flexible project implementation is necessary to address priorities and available
4 funding. Rogow Dec. ¶¶ 12-16, 28-29. As CNMI funding under the EEMC Order
5 is limited in amount, under a defined schedule, subject to potential grant
6 restrictions, and will not fully fund SO2 projects, the EEMC Order allows for a
7 process that authorizes EPA to determine the schedule and which projects will be
8 implemented by the EEMC. EEMC Order ¶¶ B1, B2, B6, D1(f); Rogow Dec. ¶¶
9 12-16, 28-29.

10 For initial planning purposes, EPA and CUC created a list of projects from
11 which EPA will identify top priorities and assign those projects to the EEMC or to
12 CUC (or retained by EPA), depending upon available funding. *Id.* ¶ 13. This
13 initial list of thirteen SO2 projects is not part of the EEMC Order but utilized by
14 CUC for purposes of its motion. However, in no manner is EPA limited by the
15 thirteen SO2 project list in prioritizing and assigning projects, nor does it limit
16 CUC's obligations regarding SO2. *Id.* ¶¶ 13-16, 28-29; EEMC Order ¶ B2; SO2
17 *Passim*. The reasons for providing EPA flexibility in determining which projects
18 will be implemented by the EEMC are not exceptional or unusual.

19
20 First, although EPA and CUC attempted to forecast future costs for the
21 thirteen SO2 projects, the actual project costs are subject to uncertainty. Rogow
22 Dec. ¶ 14. For example, currently listed projects include the CUC pipeline and
23 facility drainage at each of the power plants. However, since no EEMC or
24 subcontractor contracts are in place, the actual project costs are not known. The
25 CUC pipeline is a high priority and the estimated cost of completing this project is
26 substantial and will impact how much other work can be accomplished with the
27 available funding - including the remaining "twelve SO2 projects." With respect
28 to the facility drainage, an engineering assessment has not been undertaken so the

1 final design is yet to be determined and the actual cost of the project could be
2 subject to substantial change. If, for example, the power plant facility drainages
3 project exceeds current cost estimates, EPA might direct the EEMC to implement
4 other projects with available funding. Also, other work may arise that may not be
5 included in the thirteen SO₂ projects such as newly identified critical SO₂ needs
6 like an oil spill or waste management projects that EPA determines should be
7 implemented by the EEMC. EPA is not limited to CUC's list of thirteen SO₂
8 projects in deciding which SO₂ projects should be assigned to the EEMC. *Id.*

9
10 Second, the scope of the work that EPA can actually assign to the EEMC is
11 subject to grant and other funding and the funding schedule. EEMC Order ¶
12 D1.(a)-(d).; Rogow Dec. ¶ 15. Currently, CNMI is only required to deposit \$5M
13 into the Court Registry by December 31, 2014. This first payment and subsequent
14 payments limit the amount of work that the EEMC can conduct. With regard to
15 the grant-based funding, there may be restrictions imposed by DOI on the use of
16 the funding. Similarly, since CNMI is required to fund the Court Registry or
17 provide notice of funding over a four year period, EPA retained project flexibility
18 to ensure that the assigned EEMC projects mesh with the CNMI funding
19 availability to ensure that the most important projects are addressed first. If CNMI
20 does not meet its EEMC Order funding obligations, it would also impact the nature
21 of the projects performed by the EEMC. Rogow Dec. ¶¶ 12-16, 28-29.

22 Third, if the cost of CUC's thirteen SO₂ projects exceeds the CNMI EEMC
23 Order funding requirements, the EEMC would not be tasked by EPA to complete
24 these projects. *Id.* ¶ 16. The Court may recall that CUC requested that EPA retain
25 the option of selecting CUC to conduct SO₂ projects as CUC expressed concern
26 that the EEMC would unnecessarily spend these funds, thereby leaving CUC with
27 ultimate responsibility for completing all SO₂ obligations. *Id.*; *SO₂ Passim*;
28 EEMC Order ¶ B2.

US' RESPONSE TO CUC'S MOTION TO CONSTRUE AND CLARIFY ORDER
United States v CUC, et al. 08-CV-0051

For these reasons, the Court should reject CUC's construct that the EEMC Order requires the EEMC to implement CUC's thirteen SO2 projects – these projects and CUC's asserted limitation *simply do not exist in the EEMC Order*. EEMC Order *Passim*; *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (The instrument must be construed as it is written); accord, *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996).

4. Tank 102

As described above, there is no basis for CUC's argument that the EEMC is solely required to implement CUC's thirteen SO2 projects. As CUC's Motion focuses on Tank 102, the United States must point out that CUC is not being accurate regarding Tank 102.

CUC argues that Tank 102 is required to be implemented by the EEMC using CNMI funding and in support of that argument provides an apparent excerpt from a spreadsheet describing potential project costs. *See*, Declaration of Andrew Longworth ¶ 6, Dkt No. 164. CUC utilizes the spreadsheet excerpt as a foundation for its motion and argues that the funding totals confirm that CUC never intended to implement Tank 102 and that this responsibility falls upon the EEMC. *Id.*

However, CUC fails to inform the Court that on September 28, 2014 (two days after the Court entered the EEMC Order), CUC provided EPA with a project prioritization and cost estimate spreadsheet that admits that the Tank 102 project is “CUC SCOPE - NOT EEMC.” Rogow Dec. ¶ 25; Ex. 1, at 6 (*see*, column “Facility” at row “PP1/2” at line “Tank 102” in the “Notes” section on the last page of the spreadsheet). This admission - that CUC failed to provide the Court - is sufficient reason to deny CUC's request.

CUC's obligation to construct Tank 102 comports with representations it previously made to the Court. The Court may recall that CUC is under contract with Tano Group, an approved EPA contractor for this work, to construct Tank 102

1 and that sufficient grant and CUC funding is earmarked for the project; therefore,
2 there was no reason to delay completing this important project until the EEMC is
3 selected. *Id.* ¶¶ 19-20. The parties also advised the Court that in light of CUC's
4 expected Tank 102 progress, an appropriate date for a CNMI-based status
5 conference would be the end of February, 2015. *Id.* ¶ 20.

6 Further, based on CUC's obligation to construct Tank 102, the United
7 States agreed to accept the \$5M Court Registry payment due on December 31,
8 2014, and the \$2.8M payment due by February 1, 2015 - as this amount should be
9 sufficient for the pipeline, the first year EEMC management costs, and to begin
10 planning for other second year capital projects. However, this amount is not
11 sufficient and was not intended to address the Tank 102 construction because CUC
12 agreed to fund (without using EEMC funds / CNMI funding required under
13 Section D of the EEMC Order) and fully implement the Tank 102 construction. *Id.*
14 ¶ 23.

15 The upcoming January 4, 2015, resignation of CUC's TMO heightened
16 EPA's concern regarding CUC's ability to manage the Tank 102 construction and
17 other SO2 work. With that in mind, EPA and CUC recently discussed whether the
18 Tank 102 construction should be placed with the EEMC. *Id.* ¶ 26. However, these
19 discussions broke down as CUC insisted that the EEMC cannot utilize
20 approximately \$1.15M in non-grant funding and \$350,000 in grant funding
21 (approximately \$1.5M that is not part of the EEMC fund) already earmarked for
22 Tank 102 construction, but that those funds should flow to CUC to use as CUC
23 wishes. EPA is open to discussing whether to reverse the agreed upon course and
24 task the EEMC with the Tank 102 construction but only if the \$1.5M in earmarked
25 Tank 102 funds are used to fund the EEMC for the Tank 102 project. *Id.* ¶ 26.

26
27
28 5. CUC Contracts

CUC asserts a legally unsupportable position that the EEMC is bound by
US' RESPONSE TO CUC'S MOTION TO CONSTRUE AND CLARIFY ORDER
United States v CUC, et al. 08-CV-0051

1 and must manage CUC's existing SO2 contracts even though: 1) the EEMC is not
2 a party and had no involvement in negotiating or implementing CUC's contracts;
3 2) the EEMC may not be able or want to be bound by the terms and conditions of
4 CUC's contracts; 3) CUC's contracts may conflict with the EEMC Order and the
5 future EEMC agreement, including its specified rates and payment terms; 4) the
6 EEMC may have in house personnel or contractors to conduct the work; and 5)
7 CUC's contractors may have no interest in working with the EEMC. *Id.* ¶ 27.

8 The United States does not dispute that the EEMC has the authority to
9 assume CUC's contracts if the EEMC and the contractors agree. However, this is
10 the EEMC's and the contractor's decision and cannot be mandated by the EEMC
11 Order or directed by CUC. EEMC Order ¶ B5.(a). Basic contract law rejects
12 CUC's attempt to unilaterally impose CUC contracts on an unwilling party that did
13 not enter into the contracts. *See, e.g., Barnes v. Yahoo!*, 570 F.2d 1096, 1108 (9th
14 Cir. 2009) (the formation of a contract requires a meeting of the minds of the
15 parties that is measured by the objective manifestations of intent on both sides to
16 bind themselves to an agreement).

17 It appears that CUC is attempting to leverage the EEMC Order to resolve
18 CUC's numerous contracting issues relating to its failures to implement SO2
19 projects. For example, it did not take CUC long to seek to utilize the EEMC Order
20 to attempt to resolve the CUC / Smithbridge of Guam ("Smithbridge") contracting
21 dispute. Within two hours of the Court signing the EEMC Order and before the
22 parties exited the courthouse, CUC requested EPA to endorse the transfer of the
23 Smithbridge pipeline construction contract to the EEMC notwithstanding the
24 Court's and EPA's substantial concerns with Smithbridge's poor work relating to
25
26
27
28

pipeline.⁸ Rogow Dec. ¶ 24. Before leaving the courthouse, the United States’ rejected CUC’s Smithbridge proposal.⁹ *Id.* ¶ 24; O’Brien Dec. ¶ 7.

CUC’s Motion seeks to place CUC’s longstanding contract disputes involving numerous parties on the EEMC’s shoulders without the consent of the EEMC or the contractors. The impact of CUC’s position is not supportable and would result in imposing CUC’s contracts upon the Court, the Court’s relationship with the EEMC, and undermining available funding. CUC’s request should be denied.

III. CONCLUSION

For the reasons stated above, CUC’s Motion should be denied.

Respectfully submitted,

Dated: December 12, 2014

By: /s/ Bradley R. O’Brien
BRADLEY R. O’BRIEN
Senior Attorney
Environmental Enforcement Section
U.S. Department of Justice

Of Counsel:

Janet A. Magnuson
Assistant Regional Counsel
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, California 94105

⁸ Notwithstanding substantial concerns raised by the Court, CUC, EPA, and others, CUC alternatively sought approval for continuing to utilize Smithbridge for the pipeline construction. Rogow Dec. ¶ 24.

⁹ In an October 3, 2014 letter, the United States formally requested CUC and its Board of Directors to inform the United States in writing whether, contrary to previous commitments, CUC continued to consider Smithbridge as a viable pipeline construction company. Neither CUC nor its Board of Directors responded. O’Brien Dec. ¶ 8.